

# Victim Privacy

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## In this chapter . . .

This chapter discusses victim privacy. It deals with the balance that courts often must strike between a crime victim's right of privacy and a criminal defendant's or juvenile's rights to confront witnesses, construct a defense, and have a fair, public trial. The chapter includes discussion of the following topics:

- F limitations on interviewing or conducting psychiatric evaluations of crime victims;
- F discovery of recorded statements made by crime victims;
- F limitations on public access to information identifying where a victim lives and works;
- F limitations on public and media access to court proceedings; and
- F confidentiality protections for claimants of crime victim compensation through the Crime Victim Services Commission.

## 5.1 The Victim's Constitutional Right to Privacy

A crime victim's right to privacy is preserved in the Michigan Constitution. Const 1963, art 1, § 24, states, in part:

“(1) Crime victims, as defined by law, shall have the following rights, as provided by law:

“The right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.

This chapter contains discussion of the legal provisions that help protect the privacy and dignity of victims.

## 5.2 The Victim May Permit an Interview by Defense Counsel

Unless a witness will or may be unavailable at time of trial, defense counsel cannot compel a witness to submit to a deposition. MCL 767.79; MSA 28.1019, MCL 768.26; MSA 28.1049, and *People v Tomko*, 202 Mich App 673, 679–80 (1993). MCR 6.001(D) prohibits taking depositions in criminal cases for purposes of discovery.

Despite these limitations on depositions, the victim may allow defense counsel to interview him or her. It is improper for the prosecuting attorney to advise the victim to refuse defense counsel's request for an interview. *People v Russell*, 47 Mich App 320, 323 (1973), and *In re Bay Co Prosecutor (Bay Co Prosecutor v Bay Co Dist Judge)*, 109 Mich App 476, 482–84 (1981).

## 5.3 Psychiatric Evaluations of Victims and Witnesses

Psychiatric evaluations of witnesses are not included in the lists of matters discoverable by right in either criminal or juvenile delinquency proceedings under MCR 6.201(A) and 5.922(A)(1). However, the trial court has discretion to permit discovery of these matters under MCR 5.922(A)(2), which permits discovery of “any other materials or evidence,” and *People v Valeck*, 223 Mich App 48, 50 (1997) (trial court has discretion to order discovery of materials or evidence not covered under mandatory disclosure provisions of MCR 6.201).<sup>\*</sup> In exercising that discretion, the court may consider whether cross-examination will fully protect the defendant's right to present a defense. *People v Borney*, 110 Mich App 490, 495 (1981).

A psychiatric evaluation of a complainant in a criminal sexual conduct case may be ordered if there is “a compelling reason” to do so. *People v Payne*, 90 Mich App 713, 723 (1979). The following criminal sexual conduct cases illustrate this stringent standard:

<sup>\*</sup>See also *In re Lemmer*, 191 Mich App 253, 256 (1991) (the attorney for a respondent-parent in a child protective proceeding is not allowed to interview the child pursuant to MCR 5.922(A)(2)).

F *People v Freeman (After Remand)*, 406 Mich 514, 516 (1979)

The Michigan Supreme Court held that the trial court abused its discretion by ordering the complainant to undergo a psychiatric examination by a psychiatrist chosen by the defendant. Although the Supreme Court did not identify specific factors to consider, the Court did conclude that the defendant's "amorphous contentions" were clearly insufficient. The defendant requested the examination based on assertions that the complainant was "highly nervous" and "mentally retarded," the alleged offenses occurred two years before the request and were "uncorroborated," and the information to be gained from the examination was necessary to attack the complainant's credibility. The Supreme Court also held that if a court grants an examination, the psychologist or psychiatrist must be selected by the court.

F *People v Davis*, 91 Mich App 434, 441 (1979), and *People v Wells*, 102 Mich App 558, 563 (1980)

In each case, the defendant's assertion that a psychiatric profile of the complainant would bear on the issue of consent was held insufficient to warrant the requested examination.

F *People v Graham*, 173 Mich App 473, 478–79 (1988)

The Court of Appeals held that the trial court abused its discretion by ordering the four-year-old victim's mother to undergo a psychiatric examination. On appeal, the Court applied the "compelling reason" standard to the request but noted that examination of a victim's parent would be proper only under "extenuating circumstances." The Court concluded that the defendant could cross-examine the victim's mother regarding her alcoholism and previous unsubstantiated allegations of sexual abuse. The Court also expressed concern that the psychologist's evaluation could invade the province of the trier of fact by allowing an expert witness to render an opinion on the veracity of a witness.

## 5.4 Discovery of Written or Recorded Statements by Victims

In criminal cases, discovery is governed by MCR 6.201. MCR 6.001(A) (applicability to felony cases), and *People v Sheldon*, 234 Mich App 68, 71 (1999) (under Administrative Order No. 1994-10, MCR 6.201 applies to both misdemeanor and felony cases). Discovery in juvenile delinquency proceedings is governed by MCR 5.922(A).

Under MCR 6.201(A)(2), a party must disclose to other parties, upon request, "any written or recorded statement by a lay witness whom the party intends to call at trial . . . ." In addition, upon request, the prosecuting attorney must disclose "any police report concerning the case." MCR 6.201(B)(2). Similarly, in juvenile delinquency cases, MCR 5.922(A)(1)(b) requires disclosure of "all written or recorded nonconfidential statements made by any

\*See Section 5.6, below, for discussion of the “work-product privilege.”

person with knowledge of the events in possession or control of petitioner or a law enforcement agency, including police reports.” These rules include written statements by crime victims and statements by crime victims that are recorded.

In *People v Holtzman*, 234 Mich App 166, 168 (1999), the Court of Appeals held that a prosecuting attorney’s notes from an interview with a witness who will be called at trial do not constitute a “statement” of the witness that must be disclosed upon request under MCR 6.201(A)(2). The trial court ruled that factual information in the prosecutor’s notes constituted witness statements that should have been disclosed to defense counsel, but the Court of Appeals reversed the trial court’s ruling. On appeal, the court based its holding on two grounds: an attorney’s notes do not meet the definition of “statement” applicable to discovery requests under MCR 6.201(A)(2), and allowing discovery of such notes would compromise the “work-product privilege.” *Id.* at 168–70.\*

MCR 6.201(A)(2) requires a party to disclose to other parties, upon request, “any written or recorded *statement* by a lay witness whom the party intends to call at trial . . . .” (Emphasis added.) The court in *Holtzman* applied the definition of “statement” contained in MCR 2.302(B)(3)(c). Although MCR 2.302(B)(3)(c) expressly limits its definition to statements made by the person seeking discovery, the *Holtzman* court applied the definition to any statement made by a witness the party intends to call at trial. *Holtzman, supra*, at 176. Thus, for purposes of MCR 6.201(A)(2), a “statement” is either of the following:

“(i) a written statement signed or otherwise adopted or approved by the person making it; or

“(ii) a stenographic, mechanical, electrical, or other recording, or a transcription of it, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.” *Holtzman, supra*, at 176.

To determine whether a witness has “adopted or approved” a statement, there must be a finding of “unambiguous and specific approval” by the witness. *Id.* at 179–80, quoting *Goldberg v United States*, 425 US 94, 115–16; 96 S Ct 1338; 47 L Ed 2d 603 (1976). A witness who reviews the prosecutor’s notes for inaccuracies or in anticipation of the witness’s testimony at trial does not “adopt or approve” the notes as a statement of the witness. *Holtzman, supra*, at 180. Applying these rules, the court in *Holtzman* concluded that factual information contained in the prosecutor’s notes did not constitute witness “statements” for purposes of MCR 6.201(A)(2). *Id.*

The court in *Holtzman* also concluded that allowing discovery of an attorney’s notes from an interview with a witness would compromise the “work-product

privilege” because written interview notes often evidence the attorney’s mental processes. *Id.* at 184–85.

MCR 6.201(B)(1) requires the prosecuting attorney, upon request, to provide to the defendant any exculpatory information or evidence known to the prosecuting attorney. Moreover, the defendant has a due-process right to obtain evidence in the prosecutor’s possession if it is favorable to the defendant and material to guilt or punishment. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). The prosecutor must provide such evidence to the defendant regardless of whether the defendant makes a request. *United States v Agurs*, 427 US 97, 104; 96 S Ct 2392; 49 L Ed 2d 342 (1976). Evidence encompassed by these requirements may include inconsistent statements by the victim and victim recantations.

## 5.5 Discovery of Privileged or Confidential Information or Evidence

A “privileged communication” is “[a] communication that is protected by law from forced disclosure.” *Black’s Law Dictionary* (St. Paul, MN: West, 7th ed, 1999), p 273. Communications within the following relationships relevant to victims of crime are protected by statutory privileges:

- F physician-patient privilege, MCL 600.2157; MSA 27A.2157;
- F psychologist-patient privilege, MCL 333.18237; MSA 14.15(18237);
- F psychiatrist or psychologist-patient privilege, MCL 330.1750; 14.800(750);
- F social worker-client privilege, MCL 333.18513; MSA 14.15(18513);
- F licensed professional counselor-client privilege, MCL 333.18117; MSA 14.15(18117);
- F domestic violence and sexual assault counselor-client privilege, MCL 600.2157a; MSA 27A.2157(1); and
- F priest-penitent privilege, MCL 600.2156; MSA 27A.2156.

Confidential records include juvenile diversion records, MCL 722.828(1)–(2) and 722.829(1); MSA 25.243(58)(1)–(2) and 25.243(59)(1); records of mental health services, MCL 330.1748; MSA 14.800(748); records of federal or state drug or alcohol abuse prevention programs, 42 USC 290dd—2(a), and MCL 333.6111; MSA 14.15(6111); and records of prescriptions, MCL 333.17752; MSA 14.15(17752).

In criminal cases, if the defendant seeks information about the victim that is confidential or privileged, MCR 6.201(C) applies. That provision states as follows:

“(1) Notwithstanding any other provision of this rule, there is no right to discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a defendant’s right against self-incrimination, except as provided in subrule (2).

“(2) If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in-camera inspection of the records.

(a) If the privilege is absolute, and the privilege holder refuses to waive the privilege to permit an in-camera inspection, the trial court shall suppress or strike the privilege holder’s testimony.

(b) If the court is satisfied, following an in-camera inspection, that the records reveal evidence necessary to the defense, the court shall direct that such evidence as is necessary to the defense be made available to defense counsel. If the privilege is absolute and the privilege holder refuses to waive the privilege to permit disclosure, the trial court shall suppress or strike the privilege holder’s testimony.”

MCR 6.201(C)(2) is based on the Michigan Supreme Court’s decision in *People v Stanaway and Caruso*, 446 Mich 643 (1994). *Stanaway* involved two separate cases, each involving defendants charged with criminal sexual conduct. In *Stanaway*, the defendant sought discovery of the records of a social worker in a juvenile diversion program and a sexual assault counselor regarding the victim. In *Caruso*, the defendant sought discovery of the records of a psychologist regarding the victim. In reaching its decision, the Court balanced the need to preserve confidentiality in therapeutic settings with a defendant’s due-process right to discover exculpatory evidence. The Court held that the trial judge must conduct an in-camera inspection of privileged records “on a showing that the defendant has a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense.” *Id.* at 677. Defense counsel must not be present during the judge’s inspection of the records. *Id.* at 679. If the privilege in question is “absolute” (i.e., only the patient may waive the privilege), and if the patient refuses to waive the privilege, then the patient’s testimony must be suppressed. *Id.* at 683–84.

In *Stanaway*, the Court concluded that the “defendant’s generalized assertion of a need to attack the credibility of his accuser did not establish the threshold showing of a reasonable probability that the records contain information

material to his defense sufficient to overcome the [applicable] statutory privileges.” *Id.* at 650. In *Caruso*, the Court remanded to the trial court for a determination of whether in-camera review of the records was warranted. *Id.*

In *People v Tessin*, 450 Mich 944 (1995), the prosecuting attorney relied at trial on the victim’s psychological treatment to show the “personal injury” element of first-degree criminal sexual conduct. The defendant contended that the victim consented to the sexual conduct but later changed his mind. The defendant sought discovery of the privileged records regarding the victim’s treatment, but the trial court refused to conduct an in-camera inspection of the records. The Court of Appeals reversed the trial court’s decision, but the Supreme Court peremptorily reversed the Court of Appeals, holding that in-camera inspection of records is not required “simply because psychological harm is the alleged ‘personal injury’ which must be established to satisfy the ‘personal injury’ element of first-degree criminal sexual conduct.” *Id.*

In a case decided before *Stanaway and Caruso*, *supra*, and the effective date of MCR 6.201(C), the Court of Appeals addressed the use of privileged information at trial. The Court held that the trial court’s refusal to allow the defendant to cross-examine the victim regarding prior inconsistent statements made to her therapist violated the defendant’s right of confrontation. *People v Adamski*, 198 Mich App 133, 137–40 (1993). The Court concluded that although the literal language of MCL 330.1750; MSA 14.800(750), precluded disclosure of the statements without the victim’s consent, the privilege must yield to the defendant’s federal constitutional right to confront and cross-examine the witnesses against him.

In *People v Williams*, 191 Mich App 269, 275, n 3 (1991), the Court of Appeals assumed, without deciding, that the defendant had the right to have the trial judge view in camera the victim’s personal diary, in which she recorded details of the charged sexual assault, and to which she referred at trial. If the defendant had requested in-camera review of the diary, he may have been allowed to impeach the victim with any inconsistent statements contained in the diary. *Id.*

## 5.6 The “Work-Product Privilege” and Discovery of Victim Statements to Prosecutors

A prosecuting attorney’s\* notes or memoranda regarding statements made by a crime victim may be protected from disclosure under the “work-product privilege.” The “work-product privilege” applies to prosecutors in criminal proceedings. *People v Gilmore*, 222 Mich App 442, 453 (1997).

An attorney’s “work product” is notes, memoranda, and the like “prepared in anticipation of litigation or for trial.” MCR 2.302(B)(3)(a). To a limited extent, the opposing party may obtain “work product” materials upon a showing of “substantial need” for the materials in the preparation of the case, and that the opposing party “is unable without undue hardship to obtain the

\*See Section 5.7, below, for discussion of the applicability of the “work-product privilege” to notes regarding a victim’s statements to a “victim-witness assistant.”

substantial equivalent of the materials by other means.” *Id.* Materials containing “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation” are not discoverable, however. *Id.*, and *People v Gilmore*, 222 Mich App 442, 450 (1997). Requiring an attorney to produce “notes and memoranda of witnesses’ oral statements is particularly disfavored because it tends to reveal the attorney’s mental processes.” *Upjohn Co v United States*, 449 US 383, 399; 101 S Ct 677; 66 L Ed 2d 584 (1981).

## 5.7 Discovery of Victim Statements to “Victim-Witness Assistants”

\*See Section 5.4, above, for a discussion of rules governing discovery of statements made by victims).

Although Michigan’s appellate courts have not yet addressed this issue, courts in other states have held that defense counsel may seek to discover information or evidence in the possession of a “victim-witness assistant.” See *Murphy v Superior Court*, 689 P2d 532, 537 (Ariz, 1984) (“It is entirely possible that a victim assistance caseworker, who is frequently in close contact with a distraught victim only moments after an incident, will learn details of the incident which would make the caseworker a proper subject for discovery as a potential impeachment witness”), and *Commonwealth v Bing Sial Liang*, 747 NE 2d 112, 114, 116 (Mass, 2001) (the notes of “victim-witness advocates” are subject to the same discovery rules as are prosecuting attorneys’ notes).\*

Courts in other states have held that defense counsel may seek to discover statements made to a “victim-witness assistant” that are later provided to the prosecuting attorney. For example, in *State v Wilcox*, 758 A2d 824 (Conn, 2000), before the victim assistant interviewed the victim of a sexual assault, the prosecutor asked the victim assistant to encourage the victim to clarify key facts about the alleged assault. Following the interview, the victim assistant sent the prosecutor a note containing the victim’s clarification. The prosecutor did not provide the note to the defendant until after trial. *Id.* at 829–30. The Supreme Court of Connecticut held that because the victim assistant’s note of his conversation with the victim did not reveal substantial inconsistencies with the victim’s trial testimony, the note was not material to defendant’s guilt. Therefore, failure to disclose the note prior to trial did not violate the defendant’s right to obtain evidence in the prosecutor’s possession that is favorable to the defendant and material to guilt or punishment under *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). *Wilcox*, *supra*, at 833–36.

As the *Wilcox* case suggests, the relationship between a “victim-witness assistant” and the prosecuting attorney’s office, and the role of the “victim-witness assistant” in the proceedings, may be unclear. Although no Michigan case has delineated the role of “victim-witness assistants,” see *Genesee Co Union v Genesee Co*, 199 Mich App 717, 719, 722 (1993), where, in the context of a labor dispute, the Court stated that “victim-witness assistants” act as liaisons between victims and prosecutors but “do not serve at the pleasure

of the prosecutor.” Compare *Commonwealth v Bing Sial Liang*, 747 NE 2d 112, 116, 119 (Mass, 2001) (because “victim-witness advocates” are included in the relevant statute’s definition of “prosecutor,” are employees of the prosecutor, act as liaisons between victims and the prosecutor, and interview victims, they are subject to the same discovery rules as prosecutors).

If the “victim-witness assistant” is defined as a “representative” of the prosecuting attorney, his or her notes or memoranda regarding interviews with the victim may be protected by the “work-product privilege.”\* The court rule setting forth the “work-product privilege,” MCR 2.302(B)(3)(a), states that the rule protects materials “prepared in anticipation of litigation or for trial by or for . . . another party’s *representative* . . . .” No Michigan cases discuss whether a “victim-witness assistant” is a “representative” of the prosecuting attorney for purposes of MCR 2.302(B)(3)(a). See, however, *Commonwealth v Bing Sial Liang*, 747 NE 2d 112, 118 (Mass, 2001) (because they are members of the prosecutor’s “legal staff,” “victim-witness advocates” are subject to the “work-product privilege”), and *United States v Nobles*, 422 US 225, 238–39; 95 S Ct 2160; 45 L Ed 2d 141 (1975) (the “work-product privilege” applies to an investigator hired by the defendant because, as a practical matter, “attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial”).

Finally, a statutory privilege may protect communications between a crime victim and a “victim-witness assistant” if the latter is acting in the capacity of a social worker, licensed therapist, or “sexual assault or domestic violence counselor.”\*

- F MCL 333.18513; MSA 14.15(18513), establishes a privilege for confidential communications between a certified social worker, social worker, or social work technician and a client. If the “victim-witness assistant” is also a certified social worker, social worker, or social work technician, then this privilege may apply to communications with a crime victim. See *People v Stanaway and Caruso*, 446 Mich 643, 661 (1994) (juvenile diversion records are protected by the confidentiality provisions of the Juvenile Diversion Act, and “additional records created by the juvenile diversion officer in her capacity as a social worker are protected by the statutory social worker-client privilege”).
- F Under MCL 333.18117; MSA 14.15(18117), communications between a licensed professional counselor or limited licensed counselor and a client may be privileged. If the “victim-witness assistant” has met the legal requirements for licensure or limited licensure and is acting in his or her capacity as a counselor, then this privilege may apply to communications with a crime victim.

\*See Section 5.6, above, for a brief discussion of the “work-product privilege.”

\*See Section 5.5, above, for discussion of the discovery of privileged or confidential information or evidence. For further discussion of this issue, see Note, *My lips are sealed: The need for a testimonial privilege and confidentiality for victim-advocates*, 18 Hamline J Pub L & Policy 226, 231–32 (1996).

\*For a more detailed discussion of this privilege, see Lovik, *Domestic Violence Benchbook: A Guide to Civil & Criminal Proceedings* (MJJ, 2d ed, 2001), Section 5.8(A).

\*See Chapter 9 for a detailed discussion of victim impact statements.

\*See Section 6.3 (The Role of Victim Impact Information in “Sentence Bargaining”).

F MCL 600.2157a; MSA 27A.2157(1), establishes a privilege for confidential communications between a victim of sexual assault or domestic violence and a “sexual assault or domestic violence counselor.” The counselor must be employed or volunteer at a “sexual assault or domestic violence crisis center,” which is defined as “an office, institution, agency, or center which offers assistance to victims of sexual assault or domestic violence and their families through crisis intervention and counseling.” MCL 600.2157a(1)(d) and (e); MSA 27A.2157(1)(1)(d) and (e).\*

## 5.8 Access to Victim Impact Information Prior to Trial

In preparing a presentence investigation report (“PSIR”) or a disposition report for a juvenile, a probation officer must solicit victim impact information from the victim. The victim may provide a written statement, which must be included in the PSIR, or an oral description of the impact of the crime, which the probation officer may summarize in the PSIR. MCL 780.764; MSA 28.1287(764), MCL 780.792(1) and (2); MSA 28.1287(792)(1) and (2), and MCL 780.824; MSA 28.1287(824).\* If the victim provides a written statement to the probation officer prior to trial, the statement may be discoverable under MCR 6.201(A)(2). That rule requires the disclosure of “any written or recorded statement by a lay witness whom the party intends to call at trial.” Even if the victim is not called to testify at trial, the victim’s written impact statement submitted prior to trial may be discoverable. See *People v Rohn*, 98 Mich App 593, 599–600 (1980), rev’d on other grounds 460 Mich 55 (1999) (although MCL 791.229; MSA 28.2299, preserves the confidentiality of presentence reports, a defendant’s rights of confrontation and impeachment outweigh the state’s interest in the confidentiality of the reports).

Victim impact statements submitted prior to trial may be used by both the prosecution and defense to impeach the victim’s trial testimony. The prosecuting attorney may also make use of the victim impact statement during the plea-bargaining process and to determine an appropriate amount of restitution.\* Because of their strategic importance, many prosecutors prefer that victim impact statements not be submitted until after the trial is concluded unless they specifically request submission at an earlier time. However, by using separate forms to solicit information about the physical, emotional, and financial impacts of the crime, impeachment of the victim may be limited. See Section 9.9 for sample forms that may be used to elicit victim impact information.

## 5.9 Limitations on Access to Identifying Information in Court and Agency Documents

Court records and confidential files are not subject to disclosure under Michigan’s Freedom of Information Act (“FOIA”), as the judicial branch of

government is specifically exempted from that act. MCL 15.232(d)(v); MSA 4.1801(2)(d)(v). However, court records are public unless specifically restricted by law or court order. MCR 8.119(E)(1). This section examines specific restrictions on access to court records that will help to preserve the confidentiality of crime victims' identities. Brief mention is also made of FOIA exemptions that apply to information held by law enforcement and corrections agencies.

## A. Felony Cases

MCL 780.758(2); MSA 28.1287(758)(2), limits access to the victim's home and work addresses and telephone numbers in felony cases:

“The work address and address of the victim shall not be in the court file or ordinary court documents unless contained in a transcript of the trial or it is used to identify the place of the crime. The work telephone number and telephone number of the victim shall not be in the court file or ordinary court documents except as contained in a transcript of the trial.”

Under MCL 780.769(1); MSA 28.1287(769)(1), the victim may request notification from a sheriff or the Department of Corrections of certain post-conviction events, such as escape or parole.\* The victim's address and telephone number maintained by the sheriff or Department of Corrections for notification purposes are exempt from disclosure under Michigan's Freedom of Information Act. MCL 780.769(2); MSA 28.1287(769)(2).

\*See Section 7.12 for a discussion of these notice requirements.

## B. Juvenile Delinquency Cases

Under MCL 712A.28(2); MSA 27.3178(598.28)(2), and MCR 5.925(D)(1), the general rule is that all *records* of the “juvenile court” are open to the general public, while *confidential files* are not open to the public. MCR 5.903(A)(9) defines “records” as the pleadings, motions, authorized petitions, notices, memoranda, briefs, exhibits, available transcripts, findings of the court, and court orders. MCR 5.903(A)(18) defines “confidential files” as all materials made confidential by statute or court rule, including:

- F the separate statement by an investigating agency about known victims of juvenile offenses as required by MCL 780.784; MSA 28.1287(784);\*
- F the testimony taken during a closed proceeding pursuant to MCR 5.925(A)(2) and MCL 712A.17(7); MSA 27.3178(598.17)(7);\* and
- F court materials or records that the court has determined to be confidential.

\*See Section 7.4 on this statement of known victims.

\*See Section 5.14, below, for discussion of closing juvenile proceedings to the public.

MCR 5.925(D)(2) states that confidential files shall only be made accessible to persons found by the court to have a legitimate interest. In determining whether a person has a legitimate interest, the court must consider:

- F the nature of the proceedings;
- F the welfare and safety of the public; and
- F the interests of the juvenile.

The victim may request notification from a sheriff or the Department of Corrections of certain post-conviction events regarding a juvenile who was sentenced as an adult following “designated proceedings.”\* Pursuant to MCL 780.798(5); MSA 28.1287(798)(5), the victim’s address and telephone number maintained by the sheriff or Department of Corrections for notification purposes are exempt from disclosure under Michigan’s Freedom of Information Act.

\*See Section 7.12 for a discussion of these notice requirements. Exemption from disclosure under FOIA is effective June 1, 2001.

### C. Misdemeanor Cases

Article 3, the misdemeanor article of the CVRA, contains broader protections than Articles 1 and 2. MCL 780.816(1); MSA 28.1287(816)(1), provides that the post-arraignment notice from the court to the prosecuting attorney containing the victim’s name, address, and telephone number is not a public record.\*

\*See Section 7.6(C) for discussion of this post-arraignment notice.

MCL 780.830; MSA 28.1287(830), provides that a victim’s address and telephone number maintained by a court or a sheriff for any purpose under Article 3 are exempt from disclosure under Michigan’s Freedom of Information Act.

## 5.10 Prohibited Disclosure of Visual Representations of Victim

Victims of crime have a state constitutional right to be treated with respect for their dignity and privacy. Const 1963, art 1, § 24. To protect this right, all articles of the CVRA exempt from disclosure under Michigan’s Freedom of Information Act the following information and visual representations of a crime victim:

“(a) The home address, home telephone number, work address, and work telephone number of the victim unless the address is used to identify the place of the crime.

“(b) A picture, photograph, drawing, or other visual representation, including any film, videotape, or digitally stored image of the victim.” MCL 780.758(3)(a)–(b); MSA 28.1287(758)(3)(a)–(b). See also MCL

780.788(2)(a)–(b); MSA 28.1287(788)(2)(a)–(b), and MCL 780.818(2)(a)–(b); MSA 28.1287(818)(2)(a)–(b).

However, these provisions “shall not preclude the release of information to a victim advocacy organization or agency for the purpose of providing victim services.” MCL 780.758(4); MSA 28.1287(758)(4), MCL 780.788(3); MSA 28.1287(788)(3), and MCL 780.818(3); MSA 28.1287(818)(3).\*

\*The provisions discussed in this section are effective June 1, 2001.

## 5.11 Limitations on Film or Electronic Media Coverage in Courtrooms

By Administrative Order No. 1989-1, 432 Mich cxii (1989), the Michigan Supreme Court ruled that film or electronic media coverage is permitted in all Michigan courts. With limited exceptions, requests for film or electronic media coverage must be allowed if the requests are made at least three business days before the beginning of the proceeding to be filmed. *Id.* at Part 2(a).

The Administrative Order authorizes a court to terminate, suspend, limit, or exclude film or electronic media coverage at any time upon a finding that the fair administration of justice requires such action, or that rules established under AO 1989-1 or additional rules imposed by the judge have been violated. This decision is not appealable. Also, the judge has sole discretion to exclude coverage of certain witnesses, including but not limited to the victims of sex crimes and their families, police informants, undercover agents, and relocated witnesses. *Id.* at Part 2(b), (d). The judge may bar coverage of jurors and jury selection, and may require members of the media to make pooling arrangements on their own and, in the absence of such arrangements, to bar media coverage. *Id.* at Part 2(c), 4(d).

## 5.12 Closing Preliminary Examinations in Criminal Proceedings

In a case involving charges of criminal sexual conduct in any degree, assault with intent to commit criminal sexual conduct, sodomy, gross indecency, or any other offense involving sexual misconduct, the court may close a preliminary examination to the public on motion of a party if:

“(a) The magistrate determines that the need for protection of a victim, a witness, or the defendant outweighs the public’s right of access to the examination.

“(b) The denial of access to the examination is narrowly tailored to accommodate the interest being protected.

“(c) The magistrate states on the record the specific reasons for his or her decision to close the examination to members of the general public.” MCL 766.9(1)(a)–(c); MSA 28.927(1)(a)–(c).

See also *In re Closure of Prelim Exam (People v Jones)*, 200 Mich App 566, 570 (1993) (district court should only close those portions of the preliminary examination in which sensitive subject matter is discussed).

To determine whether closure of the preliminary examination is necessary to protect a victim or witness, the court must consider:

“(a) The psychological condition of the victim or witness.

“(b) The nature of the offense charged against the defendant.

“(c) The desire of the victim or witness to have the examination closed to the public.” MCL 766.9(2)(a)–(c); MSA 28.927(2)(a)–(c).

The court may close a preliminary examination to protect the right of a party to a fair trial only if both of the following apply:

“(a) There is a substantial probability that the party’s right to a fair trial will be prejudiced by publicity that closure would prevent.

“(b) Reasonable alternatives to closure cannot adequately protect the party’s right to a fair trial.” MCL 766.9(3)(a)–(b); MSA 28.927(3)(a)–(b).

## 5.13 Closing Criminal Trials

Criminal trials must be open to the public unless the trial court enters findings that no alternative short of closure will adequately assure a fair trial for the accused. *Richmond Newspapers, Inc v Virginia*, 448 US 555, 580–81; 100 S Ct 2814; 65 L Ed 2d 973 (1980).

A defendant’s Sixth Amendment right to public trial extends to pretrial suppression hearings. *Waller v Georgia*, 467 US 39, 43–47; 104 S Ct 2210; 81 L Ed 2d 31 (1984).

Before imposing a gag order or closing proceedings to the public and press, a trial court must consider alternatives. These include:

- F adoption of stricter rules governing use of the courtroom by reporters;\*
- F insulation or sequestration of witnesses;\*
- F regulation of the release of information to the press by law enforcement personnel, witnesses, or counsel;
- F a court order proscribing extrajudicial statements by any law enforcement personnel, party, witness, or court official which divulges prejudicial matters;

\*See Section 5.11, above.

\*See Section 8.2.

- F continuance of the case until the threat of news prejudicial to defendant's fair trial rights abates;
- F change of venue; and
- F sequestration of the jury.

*Sheppard v Maxwell*, 384 US 333, 358–63; 86 S Ct 1507; 16 L Ed 2d 600 (1966).

Parties to a criminal trial may not, by their mere agreement, empower a judge to exclude the public and press from a session of the court, and the defendant cannot waive his or her Sixth Amendment right to public trial in absolute derogation of the public interest in seeing that justice is administered openly and publicly. *Detroit Free Press v Macomb Circuit Judge*, 405 Mich 544, 546, 549 (1979), and *Detroit Free Press v Recorder's Court Judge*, 409 Mich 364, 385–93 (1980).

## 5.14 Closing Juvenile Delinquency Proceedings

MCR 5.925(A)(1) provides that, as a general rule, all juvenile court proceedings on the formal calendar and all preliminary hearings shall be open to the public. However, MCL 712A.17(7); MSA 27.3178(598.17)(7), and MCR 5.925(A)(2) allow the court to close proceedings to the general public under limited circumstances. The court, on motion of a party or a victim, may close proceedings to the general public during the testimony of a juvenile witness or a victim to protect the welfare of the juvenile witness or victim. In making such a decision, the court must consider:

- F the age and maturity of the juvenile witness or the victim;
- F the nature of the proceedings; and
- F the desire of the juvenile witness, of the juvenile witness' family or guardian, or of the victim to have the testimony taken in a room closed to the public.

For purposes of MCL 712A.17(7); MSA 27.3178(598.17)(7), a "juvenile witness" does not include the juvenile against whom the proceeding is brought for a criminal offense. MCL 712A.17(8); MSA 27.3178(598.17)(8), and MCR 5.925(A)(2).

If a hearing is closed under MCL 712A.17(7); MSA 27.3178(598.17)(7), the records of that hearing shall only be open by order of the court to persons having a legitimate interest.\* MCL 712A.28(2); MSA 27.3178(598.28)(2).

\*See Section 5.9(B), above, for the criteria to determine who has "a legitimate interest."

## 5.15 Confidentiality in Crime Victim Compensation Proceedings

\*See Chapter 11 for a detailed discussion of the procedures required to receive reimbursement.

Crime victims may receive reimbursement of certain crime-related expenses from the Crime Victim Services Commission (“CVSC”).\* Meetings of the Crime Victims Service Commission are open to the public, except as provided in the Open Meetings Act, MCL 15.261 et seq.; MSA 4.1800(11) et seq., and the administrative rules governing the CVSC. 1979 AC, R 18.363(1).

A victim with a claim before the CVSC may request closure of a meeting of the commission under certain circumstances:

“A claimant who wishes to have matters of intimate personal privacy considered in a closed session of the [commission] shall request a closed session, in writing, not less than 10 days prior to the scheduled date of the meeting of the [commission] where the claim shall be considered. The 10-day requirement may be waived at the discretion of the [commission] for good cause.” 1979 AC, R 18.364(1).

“Matters of intimate personal privacy” are those “dealing with the mental or physical health of a person or the details of a crime involving sexual assault in any degree.” 1979 AC, R 18.351(1)(i).

The records of open proceedings before the Crime Victim Services Commission are public records. However, a claimant’s file and a claimant’s testimony before the commission are exempt from disclosure under Michigan’s Freedom of Information Act, and a record or report obtained by the commission that is confidential under other law or rule must remain confidential. MCL 18.363; MSA 3.372(13).

Documents referred to during a closed session of the commission are part of the minutes of the meeting and are exempt from disclosure under Michigan’s Freedom of Information Act. 1979 AC, R 18.364(2). If the commission is required to utilize or refer to confidential documents during its deliberations, the commission may close a public session upon a 2/3 vote of the commission. 1979 AC, R 18.364(3).

Information regarding claims or proceedings before the commission is inadmissible in criminal proceedings. MCL 18.365; MSA 3.372(15), states:

“For purposes of this act, information relating to the filing of a claim by a claimant before the commission or proceedings before the commission, an emergency award made by the commission . . . , or final awards made by the commission . . . are inadmissible in a criminal proceeding.”